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No. 79-5269

In the

Supreme Court of the United States

October Term, 1979

ROBERT EDWARDS, *Petitioner,*

v.

THE STATE OF ARIZONA, *Respondent.*

On Writ of Certiorari to the Arizona Supreme Court

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Once a suspect has been arrested and has asked for an attorney, may he later waive his right to an attorney prior to consulting with an attorney?

2. Once a person has been formally charged with an offense, may he waive his right to an attorney prior to consulting with an attorney?

3. Assuming that petitioner could waive his right to an attorney, did petitioner make an intelligent, knowing, and voluntary waiver of his right to an attorney?

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ROBERT EDWARDS, *Petitioner,*

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THE STATE OF ARIZONA, *Respondent.*

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BRIEF FOR RESPONDENT

OPINION IN THE LOWER COURT

The opinion of the Arizona Supreme Court is reported as *State v. Edwards,* 122 Ariz 206, 594 P.2d 72 (1979).

STATEMENT OF THE CASE

On October 9, 1974, at approximately 1:00 A.M., the La Conga Bar in Tucson was robbed at gunpoint by two individuals. While one of the robbers was forcing the owner, Mr. Carlos Mungia, to open the safe, Mr. Mungia died of a heart attack. Mr. Mungia was 70 years old at the time. Mrs. Nellie Esparza, the barmaid and the only other individual in the bar at the time, was unable to identify the two robbers. Sergeant Larry Bunting, who was head of the

homicide detail, assigned detective Victor Marmion as the officer in charge. The police investigated various leads, but were unable to make any progress in determining the identities of those responsible for the murder.

In July or August of 1975, the Tucson police arrested Cleveland (Kevin) Reed for grand theft, grand theft auto, and arson. (S.A. at 2, 61.)[1] At that time, Reed was also wanted in Kansas for armed robbery, possession of a firearm, and failure to appear. (S.A. at 4, 61.) In September 1975, Mr. Reed's attorney contacted the Pima County Attorney's Office, and said that Mr. Reed had information concerning the La Conga Bar murder. A deal was worked out whereby Mr. Reed (1) would tell all he knew about the La Conga Bar murder in exchange for immunity from any charges in connection with that crime, (2) would plead guilty to grand theft and the other two charges would be dropped, and (3) the sentence he received would run concurrent with the sentence he received for the Kansas charges. (S.A. at 3, 62-63.) Mr. Reed ultimately was sentenced to 3 to 4 years for the grand theft in Arizona, and to 5 to 99 years for armed robbery, 1 to 10 years for possession of a firearm, and 1 to 5 years for failure to appear, all in Kansas. (S.A. at 4, 61.)

On September 17, 1975, Mr. Reed gave his statement to the Tucson police. (S.A. at 3, 22.) He said that he and Petitioner Robert Edwards[2] robbed the La Conga Bar while Manuel Chiquete Soto, Willie Williams, and Albert Williams were outside acting as lookouts. The police then arranged to have Mr. Reed released so that he could go back on the street and try to develop more information about the La Conga Bar murder and some other nonrelated crimes. (S.A. at 22-23, 63.) Instead, Mr. Reed left for Kansas, where he was arrested. (S.A. at 63.) Mr. Reed was ultimately returned to Arizona.

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[1] J.A. at _____ refers to the Joint Appendix, and S.A. at _____ refers to the Supplemental Appendix.

[2] Although Robert Edwards is petitioner's real name, all of the codefendants and all of the police officers knew him as Willie Barefield.

By January 1976, the police decided that they had enough evidence to proceed against the others involved. On January 19, 1976, at approximately 1:00 p.m., Detective Victor Marmion and Detective Charles Milne arrested Manny Soto. Manny Soto gave them a statement wherein he implicated Edwards. At approximately 4:00 p.m., Sergeant Larry Bunting, Detective Steve Bunting,[3] and Officer Allen arrested Edwards. (J.A. at 31.) That evening, Edwards gave the police a statement wherein he denied any involvement in the crime. The next morning, he gave another statement wherein he admitted his part in the crime. It is the admission of this second statement that is before this Court.

In January 1977,[4] Edwards asked that he be allowed to conduct his own defense. The trial court conducted a hearing on this motion, and ultimately concluded that Edwards was competent to do so. It also provided Edwards with advisory counsel.

On March 4 and 7, 1977, the trial court held a hearing on the motion to suppress. This hearing was handled by Edwards' advisory counsel, Mr. Carmine A. Brogna. After the hearing, the trial court at first granted the motion to suppress, and then 3 days later reversed itself and ruled that the confession was admissible. On March 17, 1977, the first trial began, with Edwards representing himself. This resulted in a mistrial because the jurors were unable to reach a verdict. The second trial began April 18, 1977, again with Edwards representing himself. This resulted in a verdict of guilty of murder, burglary, and armed robbery. Edwards was originally sentenced to death for the murder charge, and to a term of 25 to 50 years for the burglary and armed

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[3] Sergeant Larry Bunting and Detective Steve Bunting are not related.

[4] The reasons for these delays are not presently before this Court.

robbery charges.[5] The matter was remanded for resentencing pursuant to *State v. Watson*,[6] and Edwards was resentenced to life for the murder.

The facts surrounding the confession come from three sources: (1) the motion to suppress, where Edwards, Sergeant Larry Bunting, Detective Victor Marmion, Detective Charles Milne, and Detective Paul Hallums testified; (2) the first trial, where Sergeant Bunting, Detective Marmion, and Detective Milne testified; and (3) the second trial, where Sergeant Bunting, Detective Marmion, and Detective Milne testified.[7] Edwards did not testify at either trial.

According to the officers, Edwards was arrested on January 19, 1976, at 4:00 p.m., by Sergeant Bunting, Detective Bunting, and Officer Allen. (J.A. at 31, 101, 146; S.A. at 6, 8.) Once Edwards was in the police car, Officer Allen read him his *Miranda* rights. (J.A. at 70.) The officers took him to the City of Tucson Police Station, where Sergeant Bunting interviewed him, and Detective Bunting witnessed the interview. (J.A. at 32.) Detective Bunting read Edwards his *Miranda* rights. (J.A. at 33, 102, 111; S.A. at 7.) Edwards said that he understood them, that he would waive them, and that he would answer questions. (J.A. at 33, 104; S.A. at 7.) Detective Bunting then showed Edwards a copy of the statement Cleveland Reed had given, and told Edwards that Manny Soto had also given a statement. (J.A. at 38, 104, 111, 147; S.A. at 15.) Edwards said that he too would give a statement, and gave what he described in his own words as an alibi statement. (J.A. at 34, 35, 107, 110,

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[5] By then, Willie Williams had defended himself, and was acquitted of murder, but found guilty of burglary and armed robbery. This conviction was affirmed in a memorandum decision. Manny Soto was convicted of murder, armed robbery, and armed burglary. This conviction was affirmed in an opinion. *State v. Soto*, 117 Ariz. 345, 572 P.2d 1183 (1977). Albert Williams was found incompetent, and was never tried.

[6] 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979).

[7] The testimony from the motion to suppress appears in the Joint Appendix at pages 30-90. The testimony from the two trials appears in the Joint Appendix at pages 95-155 and in the Supplemental Appendix.

146; S.A. at 8, 12.) Prior to this statement, Sergeant Bunting again advised Edwards of his *Miranda* rights. (J.A. at 45, 104; S.A. at 18, 20.) This statement was recorded on tape. (J.A. at 33; S.A. at 12.)

Shortly after Edwards gave this statement, Detective Paul Hallums saw Edwards in the police station. (J.A. at 34, 61.) Detective Hallums was assigned to the armed robbery detail, and wanted to talk to Edwards about an unrelated armed robbery. (J.A. at 61-62.) This conversation took place in the same room Sergeant Bunting had been using, and lasted about 5 to 10 minutes. (J.A. at 36, 62-63.) After he was finished, Detective Hallums asked Edwards if he would like to speak to Sergeant Bunting again, and Edwards said he would. (J.A. at 35, 62.) Detective Hallums then told Sergeant Bunting that Edwards wanted to talk further. (J.A. at 35.)

Edwards then told Sergeant Bunting that he had been around a while and knew how things worked, and wanted to make a deal. (J.A. at 36, 39, 40, 107, 111; S.A. at 9.) Edwards' proposal was that, if Sergeant Bunting would give him a deal, he would make a statement, but he would not indicate what the statement was about. (J.A. at 37, 112, 149; S.A. at 19.) Sergeant Bunting told Edwards that he could not give Edwards a deal, all he would do is give Edwards a chance to give his side of the story. (J.A. at 37, 39, 40; S.A. at 9.) The two of them went back and forth for about an hour discussing the request for a deal. (J.A. at 39, 40; S.A. at 10.) At some point, Detective Bunting informed Edwards that only the County Attorney could make a deal. (J.A. at 107.) Edwards then asked to speak to the County Attorney. (J.A. at 39, 44.) Sergeant Bunting contacted Deputy County Attorney Randy Stevens. (J.A. at 37-38, 107; S.A. at 10.) Edwards told Randy Stevens that he wanted a deal to give his side of the story. (J.A. at 107-08.) Edwards and Stevens were unable to reach an agreement. (S.A. at 9.) Ultimately, Edwards informed Sergeant Bunting that he would wait for an attorney before making a deal. (J.A. at 37, 38, 39, 41, 43, 151, 153; S.A. at 9, 20.) At no time did

Edwards say to Sergeant Bunting or any of the other officers that he would not talk to them until he spoke to an attorney. (J.A. at 39, 43-46, 148, 152, 153; S.A. at 18, 19-20.) At about 7:00 p.m., Sergeant Bunting had Edwards taken to the Pima County Jail.[8] (J.A. at 40, 90, 112; S.A. at 17-18.)

The next morning, Detective Marmion, the lead detective in the case, decided to go over to the Pima County Jail and talk to Edwards. (J.A. at 51, 134; S.A. at 24, 31, 34, 41.) He knew generally that Edwards had given an alibi statement, but he did not know the details of it. (J.A. at 51, 130; S.A. at 31.) Detective Marmion had with him his file of the case, including Manny Soto's taped confession, which Edwards had not yet heard. (J.A. at 56; S.A. at 34-35.) Detective Milne, who had been in the homicide division less than 5 months, had been assigned by Sergeant Bunting to accompany Detective Marmion as part of Detective Milne's educational process. (J.A. at 64-65, 140-41.) At approximately 9:15 a.m., Detective Marmion had Edwards brought to one of the interview rooms, which is where attorneys confer with their clients. (J.A. at 57, 66, 123.) Upon Edwards arrival, Detective Marmion identified himself and advised Edwards that he was working on the La Conga Bar case. (J.A. at 57.) He read Edwards his *Miranda* warnings, and asked if Edwards would like to talk to them. (J.A. at 57, 123, 141; S.A. at 24, 34.) Edwards said that he would, but first asked to hear Manny Soto's statement. (J.A. at 55, 57, 123, 134, 141; S.A. at 25, 34.) Detective Marmion then played about 9 to 12 minutes of Manny Soto's statement. (J.A. at 58, 123, 134; S.A. at 25.) Edwards then said that he would make an oral statement, but he did not want it taped. (J.A. at 53, 55, 58, 67, 123, 142; S.A. at 25, 37, 46, 53.) Detective Marmion carefully explained to Edwards that it did not matter whether it was oral or on tape, the two officers could testify in court about any statement that Edwards made. (J.A. at 53, 54, 58, 59, 67-68, 123-24; S.A. at

[8] Sergeant Bunting testified that he did not instruct anyone to put Edwards in solitary. (S.A. at 18.)

25, 37, 47, 52, 53.) Edwards said that he understood this, but he still did not want the statement on tape. (J.A. at 68-69, 142; S.A. at 25, 37, 47, 53.) Edwards then gave an oral statement wherein he admitted his involvement in the La Conga Bar murder. (J.A. at 124-25, 142-43; S.A. at 25, 27-28.)

After Edwards made this statement, an officer informed the detectives that someone was calling to advise them that Willie Williams had been arrested. (J.A. at 128; S.A. at 36.) Detective Milne left the room to take the telephone call. (S.A. at 39, 53.) When he returned, Edwards asked the detectives to return after they had talked to Willie Williams, and tell him what Williams had to say. (J.A. at 128; S.A. at 40, 43.) The detectives then left. When they got back to their car, they dictated what they remembered into a tape recorder. (J.A. at 58-59, 126, 136; S.A. at 35.) This tape was later transcribed as a supplemental report, and the tape erased.[9] (S.A. at 136.)

Edwards testified twice during the hearing on the motion to suppress, and gave testimony that was for the most part inconsistent with that given by the officers. The first time that he testified was on Friday, March 4, 1977. He admitted giving a taped statement to Sergeant Bunting on January 19, 1976. (J.A. at 48.) He admitted that Detective Marmion tried to get another statement from him the next day. (J.A. at 48.) He said that he did not ask Detective Marmion to come to see him, but he did not say anything about refusing to talk to anyone. (J.A. at 48.) At this point, Edwards said that he did not give a statement to Detective Marmion. (J.A. at 50.)

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[9] Sergeant Bunting testified that the tapes used to produce the police reports are used over and over, so it is standard practice to erase a tape once it has been transcribed and checked by the officer who made the report.

The following Monday, Edwards again testified, but this time he gave a much more detailed version of what happened. Edwards admitted that he had been read his *Miranda* rights, and stated that he understood what they meant. (J.A. at 71.) He admitted that he gave the taped statement to Sergeant Bunting. (J.A. at 71-72.) Edwards said that he requested to speak to an attorney, so Sergeant Bunting called an attorney and gave the telephone to Edwards. (J.A. at 73.) Edwards said that he asked the attorney who he was, and, when he found out that it was a "district attorney,"[10] hung up after about 3 or 4 seconds.[11] (J.A. at 73, 82.) Edwards said that Sergeant Bunting offered him a deal, but he said that he refused to talk about a deal before first talking to his attorney. (J.A. at 73-74.) Edwards said that the officers realized that he would not confess, so they had him taken to the jail. (J.A. at 75-76.) He said that one of the officers who had been interrogating him said, "Put him in solitary," but he was unable to remember which officer it was.[12] (J.A. at 76.) He said that he was placed in solitary with a "brother" named Al J. Carter.[13] (J.A. at 77.)

Edwards said that the next morning a detention officer came to get him, but he refused to come out of his cell and talk to anyone.[14] (J.A. at 77, 80.) Edwards said that, upon seeing Detective Marmion and Detective Milne, he told them that he did not want to talk to anyone. (J.A. at 78.) He did admit, however, that he said that he wanted to hear

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[10] Prosecuting attorneys in Arizona are County Attorneys, although many people refer to them as district attorneys.

[11] Randy Stevens was not called as a witness at either the suppression hearings or at the trials.

[12] Sergeant Bunting, Detective Marmion, and Detective Milne all testified that they did not know where Edwards was kept in the Pima County Jail. (J.A. at 135; S.A. at 18, 31, 51.)

[13] Edwards also refered to the officer who arrested him as a "brother." (J.A. at 81.) It appears therefore that he uses this term to describe fellow blacks, and not necessarily as a term of friendship.

[14] The state did not put on any of the detention officers, so this particular point was not contradicted by any of the state's evidence.

Manny Soto's tape. (J.A. at 78.) He then said that Detective Marmion offered to talk to the "D.A." and give him a break if he gave a statement. (J.A. at 79.) He said that he told Detective Marmion that he did not want anything used against him in court, but that he did not understand Detective Marmion's explanation. (J.A. at 79, 80.) He then admitted that he did give a statement to Detective Marmion. (J.A. at 79.) When asked why he did not admit making this statement when testifying the previous Friday, he said that he was "confused." (J.A. at 80, 83.)

Following the hearing, the trial court made a detailed explanation of its ruling on the motion to suppress. The trial court stated that it found the statements made by Edwards to be voluntary. (J.A. at 91, 92.) It stated that it found the testimony of the officers to be credible and that Edwards' was not. (J.A. at 91.) The trial court found that Detective Marmion went to the jail on January 30, 1976, on his own. (J.A. at 92.) The statement was admitted at trial, and Edwards was found guilty.

SUMMARY OF ARGUMENT

The resolution of this case depends on several important facts. On the day petitioner was arrested, he was advised of his rights on three separate occasions, and he said that he understood them. After he made an alibi statement, he told the officers that he had been around and knew how the system worked, and he wanted them to make him a deal. When the police officers would not make him a deal, petitioner said he would wait until he got an attorney before he made a deal. The next morning, two different officers went to see petitioner. They again advised petitioner of his rights, and he acknowledged that he understood his rights and said that he would talk to the officers. He then asked to hear the taped confession of one of his codefendants. After hearing this confession, petitioner made his incriminating statement.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court established that a suspect has a right to an attorney under the Fifth and Sixth Amendments once he is arrested. This Court did not, however, establish a rule that, once a suspect has asked for an attorney, he may not change his mind and make a statement prior to seeing an attorney. All of the Circuit Courts that have addressed this issue have rejected this *per se* rule. The rule that they do adopt is that a suspect may change his mind and waive his right to an attorney as long as there is an intelligent, knowing, and voluntary waiver.

In *Brewer v. Williams*, 430 U.S. 387 (1977), this Court reiterated that a person has the right to counsel under the Sixth and Fourteenth Amendments once he has been formally charged with a crime, but this Court also indicated that this right may be waived without notice to counsel. The Circuit Courts that have addressed this issue have agreed that such a waiver is possible, again as long as it is an intelligent, knowing, and voluntary waiver.

The record in this case shows a clear waiver of these rights. Petitioner knew his rights, and never said to the police that he would not talk to them until he spoke to an attorney. Prior to making the incriminating statement, petitioner was again advised of his rights, and made an intelligent, knowing, and voluntary waiver of them.

ARGUMENT

I. Once a Suspect Has Asserted His Right to an Attorney, He May Later Waive That Right Prior to Seeing an Attorney.

Petitioner contends that, once a suspect has been advised of his rights under *Miranda v. Arizona*,[15] and has requested an attorney, he may never waive that right until he consults with an attorney, and any statement made prior to consultation with an attorney is *per se* inadmissible. The Circuits Courts that have addressed this issue have held

[15] 384 U.S. 438 (1966).

that there is no such *per se* rule. *White v. Finkbeiner*, 611 F.2d 186 (7th Cir. 1979); *Nash v. Estelle*, 597 F.2d 513 (5th Cir.) (en banc), *cert denied*, 444 U.S. 981 (1979); *United States v. Hauck*, 586 F.2d 1296 (8th Cir. 1978), *cert. denied*, 441 U.S. 947 (1979); *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.) (en banc), *cert. denied*, 436 U.S. 919 (1978); *United States v. Grant*, 549 F.2d 942 (4th Cir.), *cert. denied*, 432 U.S. 908 (1977); *Cobbs v. Robinson*, 528 F.2d 1331 (2d Cir. 1975), *cert. denied*, 424 U.S. 947 (1976).[16] For the following reasons, respondent asks this Court to reject the *per se* rule, and instead adopt a rule that a suspect may later waive his right to an attorney, even though he has previously requested one, provided the subsequent waiver is shown to be intelligently, knowingly, and voluntarily made.

In *White v. Finkbeiner, supra*, White was arrested on an unrelated charge, and read his *Miranda* rights. When the officer attempted to question White, he said, "I'd rather see an attorney." The officer thereupon stopped any questioning. Over the next 2 days, White was questioned by several officers other than the one whom he first advised of his desire for an attorney. Before each of these subsequent interrogations and admissions, the officers advised White of his *Miranda* rights, and White signed waiver forms. White challenged these later confessions as a violation of his right to an attorney as provided in *Miranda*.

The court first held that White's statement "I'd rather see an attorney" was a request sufficient to invoke his right to an attorney under *Miranda*. It then addressed the question of a subsequent waiver. It began by looking at the purpose behind *Miranda* and *Michigan v. Mosley*,[17] and determined that a *per se* rule would be going too far toward protecting a suspect's rights. The *per se* rule would im-

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[16] The Sixth Circuit, in *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978), found that there had been a refusal to stop questioning after a request for an attorney, so it did not have to face the question of a *per se* rule. *See also United States v. Charlton*, 565 F.2d 86 (6th Cir. 1977).

[17] 423 U.S. 96 (1975).

prison a person in his own privilege. It would lose touch with the purpose and policy behind *Miranda*—a knowing and free exercise of constitutional rights. Finally, it would lead to a mechanical approach to the resolution of the issue. The court chose instead to adopt a case-by-case approach wherein it would look at the particular facts of the case to see if there was a knowing and voluntary waiver.[18] This determination would be pursuant to the traditional considerations set forth in *Johnson v. Zerbst*.[19]

In *United States v. Hauck, supra,* an F.B.I. agent interviewed Hauck while he was incarcerated in a part of the South Dakota prison system. Hauck was suspected of sending threatening letters to a state judge. The agent advised Hauck of his *Miranda* rights, and later asked Hauck for a handwriting sample. Hauck asked for an attorney, and then asked when he would get one. After the agent explained the procedure for obtaining an attorney, Hauck said that retaining an attorney seemed like too much trouble, and proceeded with the interview.

Hauck challenged his confession as a violation of *Miranda,* and pointed to the language in *Miranda* that says that all interrogation must stop once there has been a request for an attorney. 384 U.S. at 474. The court acknowledged this, but noted the language following this that says, if the interrogation continues without the presence of an attorney, the state must carry the heavy burden of showing that there was a knowing and intelligent waiver of the right to remain silent and the right to an attorney. 384 U.S. at 475. The court concluded that Hauck affirmatively withdrew his request for an attorney.

In *United States v. Rodriguez-Gastelum, supra,* customs officers stopped Rodriguez-Gastelum, advised him of his *Miranda* rights, questioned him, and then arrested him. After being taken to the Drug Enforcement Administration Office, he was again questioned. The officer first read him

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[18] *Accord, Kennedy v. Fairman,* 618 F.2d 1242 (7th Cir. 1980).

[19] 304 U.S. 458 (1938).

his *Miranda* rights, and asked him if he would talk. He answered, "Okay, okay, but with an attorney." The officer said, "Do you want to talk to me now without an attorney?" Rodriguez-Gastelum said, "That's fine." Rodriguez-Gastelum contended that his request for an attorney was disregarded, and the continued questioning deprived him of his Sixth Amendment right to assistance of counsel.

For purposes of the appeal, the court assumed that the response, "Okay, okay, but with an attorney" was sufficient to invoke the protection of the Fifth Amendment and Sixth Amendment under *Escobedo v. Illinois*,[20] and *Miranda*. It then rejected the *per se* rule, and instead adopted a case-by-case approach, which would allow district courts to analyze the facts in each particular case.[21] In rejecting the *per se* rule, the court relied upon the following reasoning: (1) the *per se* rule is contrary to the whole spirit of *Mosley*; (2) the *per se* rule would "imprison a man in his privileges";[22] and (3) the *per se* rule would force courts to lose touch with the whole purpose of *Miranda*, that is, whether there was an intelligent, knowing, and voluntary waiver. Based upon this reasoning, the court concluded that the answer "That's fine" was sufficient to constitute a waiver of the prior request for assistance of counsel.

In *United States v. Grant, supra*, police arrested Grant in connection with a local bank robbery. An F.B.I. agent advised Grant of his *Miranda* rights; Grant signed the waiver and gave a statement denying any involvement in the robbery. Some time later, the agent learned that Grant was charged with robbing a Richmond bank. The agent advised Grant that he was under arrest for the Richmond robbery, and again advised him of his *Miranda* rights. Grant asked for an attorney, so the agents did not question

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[20] 378 U.S. 478 (1964).

[21] *Accord, United States v. Evans*, 575 F.2d 1286 (9th Cir.), *cert. denied*, 439 U.S. 854 (1978); *United States v. Wilson*, 571 F.2d 455 (9th Cir. 1978); *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied sub nom. Inciso v. United States*, 429 U.S. 1099 (1977).

[22] *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

him further. Grant then asked about the procedure to get an attorney, and the agents answered these questions. As the agents were about to leave, Grant suddenly said, "It's all true." The agents warned him again of his rights, and reminded him that he had requested an attorney. Grant said that he knew his rights, and that he wanted to make a statement. Grant claimed that his statements were taken in violation of his right to counsel under *Miranda*.

The court rejected this claim, and held that *Miranda* did not erect a *per se* bar to all conversation after a suspect has asked for counsel. The court did place considerable reliance on the fact that Grant initiated the discussion, and seemed to indicate that it would not hold admissible a statement made at the instigation of the officers.

In *Cobbs v. Robinson, supra,* police arrested Cobbs and advised him of his *Miranda* rights both at the time of arrest and again at the police station. The officers said that they had enough information against him, so they did not need a statement. One of the officers did reveal some of the facts known to them, and Cobbs then said that he wanted to talk to an attorney before he told them what had actually occurred. Instead of calling an attorney, however, Cobbs called his grandmother. After he spoke to her, he gave a confession to the police. Cobbs claimed that this confession was admitted in violation of his rights to an attorney under *Miranda*. The court rejected this claim. It held that Cobbs was fully and timely advised of his rights, that he was aware of them and understood them, and that he acted fully and voluntarily, and knowingly and intelligently waived his right to remain silent.

The cases cited by petitioner do not lend support for his position. They address the situation where a suspect requests an attorney, but the police continue questioning the suspect in spite of the request. In *Thompson v. Wainwright,*[23] the police arrested Thompson and advised him of his *Miranda* rights. Thompson said that he would

[23] 601 F.2d 768 (5th Cir. 1979).

make a statement, but first he wanted to talk to an attorney. The officer told Thompson that the attorney could not relate Thompson's story to the police, and said that the attorney would probably tell Thompson to say nothing. Thompson then proceeded to give the police a statement. The court held the confession inadmissible. It noted that the police did not honor Thompson's request for an attorney (and therefore his request to remain silent), and instead by presumption and persuasion got Thompson to incriminate himself. The court held that Thompson was misled into abandoning his request for counsel. This case therefore does not say that there could not be a subsequent knowing and intelligent waiver of counsel; it merely says in that case there was none.

In *Nash v. Estelle*,[24] the court held that, once a suspect has made an unequivocal request for counsel, all interrogation must stop. If the suspect makes an equivocal request for counsel, further questioning is permitted only to the extent necessary to determine exactly what the suspect meant by his request. The dissent noted that the rule in the Fifth Circuit did not prohibit a suspect from later withdrawing his previous request for an attorney:

> Our version of the *per se* rule falls between two extremes sometimes urged. We will not permit inquiry as to waiver *unless there has been a temporal break* in the custodial interrogation after the request for counsel and before the purported waiver. *Contra Wilson v. Henderson* (inquiry as to waiver permitted in all circumstances). On the other hand, where there has been such a temporal break, we will inquire into whether there has been an effective waiver *even if the purported waiver comes before the suspect has actually consulted with an attorney.*

[24] 597 F.2d 513 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979).

597 F.2d at 520 n.2 (emphasis added) (Godbold, J., dissenting).[25] This case therefor does not create a *per se* rule. Indeed, this case has been cited as authority for rejecting the *per se* rule proposed by petitioner. *White v. Finkbeiner, supra,* 611 F.2d at 192.

In *United States v. Massey,*[26] Massey told the agents on three different occasions that he did not want to talk about the crime. One of the agents told Massey that he did not want to discuss the crime, he only wanted to know about Massey's itinerary over the last 2 months. Massey signed a waiver, and gave the agent this information. This information was used to convict Massey. The court held that the agents had tricked Massey into waiving his right to an attorney. It therefore did not hold that a suspect cannot make a knowing and voluntary withdrawal of a previous request for counsel, it merely held in that case this did not happen.

In *United States v. Womack,*[27] police arrested Womack and advised him of his *Miranda* rights. He then requested an attorney. When Womack was being booked, he again asked for an attorney, and was told that "it would be taken care of." The next morning, an officer came to Womack's cell and again read him his *Miranda* rights. Womack did not renew his request for counsel because he was "scared" and because "every time I asked for one I never got one, so I gave up on the fact." The court held that "an accused may waive a previously-invoked right to counsel." 542 F.2d at 1050.[28] The court held that the waiver Womack made was not a knowing, intelligent, and voluntary waiver because Womack was under the impression that he would not be able to get an attorney.

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[25] *Accord, Blassingame v. Estelle,* 604 F.2d 893 (5th Cir. 1979); *see United States v. Brown,* 569 F.2d 236 (5th Cir. 1978) (en banc).

[26] 550 F.2d 300 (5th Cir. 1977).

[27] 542 F.2d 1047 (9th Cir. 1977).

[28] *Accord, United States v. Jackson,* 436 F.2d 39 (9th Cir. 1970), *cert. denied,* 403 U.S. 906 (1971).

In *United States v. Clark*,[29] F.B.I. agents arrested Clark pursuant to a warrant, advised him that he was a suspect in a bank robbery, and advised him of his *Miranda* rights. Clark refused to make a statement. At 4:30 p.m., two agents confronted Clark, again advised him of his *Miranda* rights, and asked him if they could interview him. Clark said, "I had better talk to a lawyer." At 8:00 p.m., the same agents went back to fingerprint Clark. Again they tried to get Clark to talk, but he again said that they must have made a mistake and arrested the wrong person. The agents then told Clark that he should talk to them if he had nothing to hide, and also said that his friend English had confessed and implicated him. Clark then refused to sign a waiver, but did agree verbally to submit to questioning without an attorney present. The court recognized that, "under given circumstances, an accused may later waive a right which he previously asserted." 499 F.2d at 807. It held that the fact that an accused has previously asserted his right to an attorney weighs heavily against a finding of a later waiver. It also held that initiation of an interview by the agents is a strong indication of an involuntary waiver. It then held that there had not been a voluntary waiver of Clark's Fifth Amendment right.

In both *United States v. Blair*,[30] and *United States v. Priest*,[31] the suspects were advised of their *Miranda* rights; they then asked for attorneys. In both cases, the officers ignored the request for an attorney, and continued asking questions. While these cases show a clear violation of the rights delineated in *Miranda*, they do not address the issue before this Court, that is, whether there can be a subsequent waiver of the right to an attorney once the suspect has requested one.

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[29] 499 F.2d 802 (4th Cir. 1974).

[30] 470 F.2d 331 (5th Cir. 1972), *cert. denied sub nom. Crews v. United States*, 411 U.S. 908 (1973).

[31] 409 F.2d 491 (5th Cir. 1969).

As did the question in *Mosley*, resolution of this issue turns on the interpretation of the language contained in the *Miranda* opinion:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.
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> . . . .
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> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

384 U.S. at 473-75 (footnote omitted). In *Mosley*, this Court noted that, although the passage states that "the interrogation must cease" when a person in custody indicates that "he wishes to remain silent," it does not state under what circumstances, if any, a resumption of questioning is permissible. 423 U.S. at 101. This Court then held that the passage did not create a "*per se* proscription of indefinite duration upon any further questioning by any police officer on any subject . . . ." 423 U.S. at 102-03. The same can be

said about the language that says that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474. The language does say that the interrogation may resume once an attorney is present, but it *does not* say that the interrogation *may not resume* under any other circumstances. Moreover, the following passage seems to negate the interpretation that interrogation may never be resumed unless an attorney is present:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently *waived his privilege against self-incrimination* and *his right to retained or appointed counsel.*

384 U.S. at 475 (emphasis added). Because this language appears one paragraph after the paragraph discussing what must happen once a suspect has either requested to remain silent or requested an attorney, it seems logical that the phrase "[i]f the interrogation continues" refers to the interrogation continuing after either a request to remain silent or a request for an attorney. This is the analysis that the Eighth Circuit followed in rejecting the *per se* rule.[32]

Allowing a subsequent waiver in both cases is both logical and consistent. If a suspect indicates he wishes to remain silent, the police cannot interrogate him until he changes his mind and decides that he does not want to remain silent. If a suspect indicates he wants an attorney, the police cannot interrogate him until he changes his mind and decides that he does not want an attorney. In both cases the analysis would be the same: was the subsequent waiver intelligently, knowingly, and voluntarily made. To make this determination, the courts would look at the usual factors, such as intelligence, experience, and adequacy of explanation of the right. It would also consider additional factors, such as amount of time between the assertion of the right

[32] *United States v. Hauck*, supra, 586 F.2d at 1298.

and the subseqent waiver and whether the police or the suspect initiated the subsequent contact, in order to determine whether the change was voluntarily made, or was a product of overbearing on the part of the police. This approach would thus be in keeping with the recent cases of *Fare v. Michael C.*,[33] and *North Carolina v. Butler*,[34] which both held that the question whether the accused waived his rights is not one of form, but rather whether the accused in fact knowingly and voluntarily waived the rights delineated in *Miranda*.[35]

Petitioner would instead have this Court adopt an inflexible *per se* rule that would exclude all confessions until an attorney is consulted. This rule would be directly contrary to the language of *Miranda*, which provides that volunteered statements are not barred by the holding of that case.[36] Petitioner supports his argument with the claim that a suspect who asks for an attorney has made the determination that he is not capable of dealing with the police and needs an attorney to deal with them. While this may be true in some cases, it may not be true in all cases, which is a major defect in any *per se* rule. The effect would be to say that a suspect who is intelligent enough to realize that he needs an attorney is suddenly no longer intelligent enough to reconsider his position.

Petitioner also argues that, if this Court chooses not to adopt an absolute *per se* rule, it should at least adopt a rule that a subsequent waiver of the previously invoked right is not permissible if the police initiated the contact that led to the subsequent waiver. As noted by the court in *United*

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[33] 442 U.S. 707 (1979).

[34] 441 U.S. 369 (1979).

[35] 442 U.S. at 724; 441 U.S. at 373.

[36] 384 U.S. at 478. The Fifth Circuit, in *United States v. Carpenter*, 611 F.2d 113 (5th Cir. 1980), held admissible a confession that Carpenter voluntarily made after he had asked for an attorney, but before he had seen one.

States v. Rodriguez-Gastelum, supra:

> Such a reading, in practical effect and under a different guise, reincorporates the *per se* rule that a majority of the court has today rejected.

569 F.2d at 488. Under the totality of the circumstances approach that respondent advocates, whether the contact was initiated by the police or by the suspect would be only one of the circumstances the trial court would have to consider. While, in many circumstances, initiation of the contact by the police might be a strong indication that the subsequent waiver was involuntary, it cannot be said that, in all circumstances, the subsequent waiver would be involuntary. The test proposed by petitioner would, however, have this effect—it would amount to a judicial determination that any subsequent waiver that followed police-initiated contact was involuntary as a matter of law, regardless of what the facts were. Respondent urges this Court to reject this approach, and instead adopt one that would allow the trial court to look at the facts, and from the facts determine if the waiver was in fact voluntary.

Allowing the police to initiate contact after a request for counsel raises another issue—the scope of permissible police conduct prior to any subsequent waiver. Under the rule proposed by respondent, once a suspect has asked for an attorney, he may not be interrogated until he either gets an attorney or changes his mind and withdraws his request for an attorney. Clearly, then, if the police conduct that leads to the change of mind by the subject amounted to interrogation, it would not be permitted.[37] In the recent case of *Rhode Island v. Innis*,[38] this Court defined "interrogation" as follows:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or

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[37] *See generally*, Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?* 67 GEO. L.J. 1 (1978).

[38] _____ U.S. _____, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

> actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

_____ U.S. at _____, 100 S. Ct. at 1689, 64 L. Ed. 2d at 308. In the case presently before this Court, respondent submits that the conduct of the officers did not amount to interrogation. At the meeting on January 20, 1976, the first thing Detective Marmion did was introduce himself, tell petitioner that he was working on the La Conga Bar murder, and then say that he wanted to talk to petitioner.[39] This much cannot be considered as "interrogation" because no one would believe that a suspect would suddenly break down at this point and confess. The next thing that Detective Marmion did was advise petitioner of his rights pursuant to *Miranda*.[40] Again, it is unlikely that a suspect will confess merely because the policeman read him his *Miranda* rights. The next thing that happened was that petitioner said that he would talk to the detectives and asked to hear Manny Soto's taped confession.[41] Assuming for the moment that Detective Marmion has instead *told* petitioner that he (Marmion) was going to play the tape, it could be argued that this act amounted to "interrogation" because the officer believed that this act was "reasonably likely to elicit an incriminating response from the suspect."[42] Respondent submits that it goes too far to consider as interrogation the mere presentation of evidence to a suspect. First of all, the presentation of evidence to a suspect is not subject to police trickery—either the police have

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[39] J.A. at 57.

[40] *Id.*

[41] *Id.*

[42] Professor Kamisar would consider it as such. *See* Kamisar, *supra* note 37, at 14-24.

the evidence or they do not.[43] Second, the presentation of evidence to a suspect is essential to an intelligent, knowing, and voluntary exercise of his rights—until the suspect knows what evidence the police have, he cannot make an intelligent determination whether to talk to them.[44] Third, the presentation of evidence may be a procedure "normally attendant to arrest and custody" as part of the investigative process. Police therefore should not be precluded from presenting evidence to the suspect for consideration.

Even if the presentation of evidence to a suspect were to be equated with "interrogation," this would not help petitioner in this case. Detective Marmion first advised petitioner of his *Miranda* rights.[45] Petitioner then said he would talk to the detectives, and *asked* to hear the tape.[46] There was therefore no interrogation without a prior waiver by petitioner.

Based upon the above authorities and reasoning, respondent urges this Court to reject a *per se* rule, and instead adopt one that would look at the totality of the circumstances, as all of the Circuit cases cited above have done. This rule would focus on the critical question that has confronted the courts in every case since *Miranda*—was there an intelligent, knowing, and voluntary waiver of a constitutional right.

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[43] By this, respondent in no way intends to condone the practice of informing the suspect that the police have evidence that they in fact do not have. If such a practice led to a waiver, any such waiver would clearly not be an intelligent, knowing, and voluntary waiver.

[44] In *Carvey v. LeFevre*, 611 F.2d 19 (2d Cir. 1979), the court held that failure to advise Carvey of an indictment against him made the waiver of counsel ineffective because it was not intelligent, knowing, and voluntary.

[45] J.A. at 57.

[46] *Id.*

ARGUMENT

II. Once a Person Is Charged With a Crime and Is Therefore Entitled to an Attorney, He May Waive That Right Prior to Seeing an Attorney.

Petitioner contends that the questioning by the detectives was a violation of his Sixth Amendment right to counsel under *Massiah v. United States,*[47] *Escobedo v. Illinois,*[48] *Brewer v. Williams,*[49] and *United States v. Henry.*[50] This Court indicated in *Williams* that this Sixth Amendment right to counsel may be waived:

> The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not.

430 U.S. at 405-06 (emphasis original, footnote omitted).

> [O]nce [the right to assistance of counsel] attached (it is conceded that it had in this case), the state could not properly interrogate Williams in the absence of counsel unless he voluntarily and knowingly waived the right . . . .

430 U.S. at 410 (Powell, J., concurring). The Second Circuit, in *Carvey v. LeFevre,*[51] has specifically held that such a right can be waived:

> A person comes under the protection of the sixth and fourteenth amendment right to counsel from the moment judicial proceedings are initiated against him,

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[47] 377 U.S. 201 (1964). Petitioner notes that the rights afforded by *Massiah* apply whether or not the person has an attorney. *McLeod v. Ohio,* 381 U.S. 356 (1965). Respondent acknowledges that petitioner's right to an attorney existed from the moment he was formally charged by the state on January 19, 1976. It is respondent's position that petitioner effectively waived this right prior to making any statement.

[48] 378 U.S. 478 (1964).

[49] 430 U.S. 387 (1977).

[50] _____ U.S. _____ (1980) No. 79-121.

[51] 611 F.2d 19 (2d Cir. 1979).

> "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Statements elicited from the accused by the police after this point without the presence or aid of a lawyer may not be used against him at trial unless the state can show that he knowingly, voluntarily and intelligently waived his right to counsel.

611 F.2d at 21 (citations omitted).[52] Based upon the reasoning in Argument I, supra, respondent asks this Court to rule that petitioner could and did waive his Sixth Amendment right to an attorney.

This does raise the question whether the Sixth Amendment right to counsel under *Massiah* is different from the Sixth Amendment right to counsel under *Miranda*, and whether the question of waiver should be judged under the same or different standards. Respondent submits that, whether the right is under *Massiah* or *Miranda*, the waiver should be judged under the same standard as any waiver of any other constitutional right—was it a knowing, voluntary, and intelligent waiver.

Petitioner appears to be arguing for a rule that would not allow a waiver until a suspect has met with counsel, or else a rule that interrogation could not take place except in the presence of counsel. Petitioner does not cite any authority for either of these rules. Petitioner argues that, because of counsel's absence at his interrogation, he was unable to present his version of what happened. Petitioner overlooks the fact that he himself insisted that the detectives not tape record the conversation. This would have allowed the trial court and the jury to hear what *actually* happened, and would have eliminated the problem of determining whether

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[52] *Accord, United States v. Springer*, 460 F.2d 1344, 1350 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972); *Coughlan v. United States*, 391 F.2d 371, 372 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968).

petitioner's version or the detectives' version was correct. In the same way that petitioner waived his right to have the conversation taped, he waived his right to have an attorney present.

Petitioner argues that, because he made a confession, he lost a bargaining advantage that he could have used to plead his way to a reduction of charges. What petitioner seems to be arguing for is a constitutionally protected right to use a confession for plea bargaining purposes. To the extent that this argument has any validity, it would apply equally to confessions obtained after a waiver of *Miranda* rights or *Massiah* rights. In light of the often repeated pronouncement that "[c]onfessions remain a proper element in law enforcement,"[53] it seems inappropriate to now remove them as an element of law enforcement and make them a tool for the suspect to use to escape responsibility for his crimes.

ARGUMENT

III. The Fourteenth Amendment Creates No Prohibition to Interviewing a Person Once He Has Waived His Right to an Attorney.

Petitioner contends that the general notions of fundamental fairness and due process prohibit the police from interviewing a person charged with a crime until he has consulted with a lawyer. Petitioner did not raise this issue below, and is therefore precluded from raising it here. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Moreover, as noted in Argument II, *supra*, this Court indicated in *Williams* that any rights under the Fourteenth Amendment may be waived without notice to counsel,[54] and the Second, Seventh, and Ninth Circuits have specifically held this to be the rule.[55] Petitioner seems to be arguing that a suspect is entitled to more protection once he is formally

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[53] *Miranda v. Arizona*, supra, 384 U.S. at 478.

[54] 430 U.S. at 405-06.

[55] *Carvey v. LeFevre*, supra; *United States v. Springer*, supra; *Coughlan v. United States*, supra.

charged. He says that this is necessary to "even the odds." But this Court in *Escobedo* and *Miranda* held that a person is entitled to assistance of counsel from the moment he is arrested. If the odds are uneven, they are just as uneven before a person is formally charged as they are after he is charged. And a confession is just as incriminating before a person is charged as it is after he is charged. A logical extension of petitioner's argument is that no confessions would be permissible until a person has consulted with an attorney. This Court has not chosen to adopt such a rule in the past, and petitioner has not shown any reason why this Court should do so now.

ARGUMENT

IV. The Record Fully Supports the Determination of the Trial Court That Petitioner Intelligently, Knowingly, and Voluntarily Waived His Right To Remain Silent and His Right to an Attorney.

Petitioner contends that the record does not support the ruling of the trial court that petitioner intelligently, knowingly, and voluntarily waived his right to remain silent. While this Court has the duty to determine if there was a waiver as a matter of constitutional law, factual determinations and resolution of disputed issues are more properly the province of the trial court, sitting as the finder of fact.[56]

On the day petitioner was arrested, he was informed of his rights three times: at the time of his arrest, at his arrival at the police station, and prior to his taped statement. Petitioner specifically told the officers that he understood his rights. At trial, petitioner presented a psychiatrist, who testified that petitioner's level of intelligence was such that he could understand what the *Miranda* rights meant, and could understand the concept that anything he said could

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[56] See *Brewer v. Williams*, supra, 430 U.S. at 395-97, 402-04. The trial court specifically noted that it believed the officers' testimony, and it did not believe petitioner's testimony. (J.A. at 91.)

be used against him. After petitioner made his taped statement, he told Sergeant Bunting that he had been around and knew how the system worked. Petitioner had been previously convicted of robbery and sentenced to prison, and was therefore not exactly a stranger to the system. After going back and forth for over an hour about making a deal, when petitioner said that he wanted an attorney before he would talk about a deal, Sergeant Bunting stopped questioning him. All of these factors show a clear understanding on the part of petitioner of the protection that *Miranda* and *Massiah* gave him, and the nature of the rights he had.

In viewing the conduct of the officers on January 20, 1976, several factors are important. At no time during petitioner's discussion with the officers on the day of his arrest did he ever say to them that he did not want to talk further until he had first talked to an attorney. Sergeant Bunting never interpreted petitioner's remarks as such a request. Petitioner was questioned for 3 hours that night, was sent to the jail at 7:00 p.m., and was not contacted again until 9:15 the next morning. Sergeant Bunting did not send Detective Marmion over to the jail the next day, Detective Marmion went on his own accord as part of his duties as lead detective on the case. Detective Marmion had with him Manny Soto's tape, which petitioner knew about but had not heard the night before. The detectives met with petitioner in one of the rooms used by attorneys to discuss cases with their clients. Upon entering the room, petitioner was again advised of his rights. Petitioner did not say to the detectives that he did not want to talk to them, and did not ask for an attorney. To the contrary, he said that he would talk to them, and asked to hear Manny Soto's tape. After hearing the tape, he freely and voluntarily made a statement.

Petitioner points to several things that he claims make the statement involuntary. In viewing these claims, it must be remembered that the trial judge, who had the opportunity to view petitioner while he was testifying, did not

believe petitioner.[57] Petitioner claims that he was taken from the police station and put in solitary in the Pima County Jail. All of the officers who testified said that they did not know where petitioner was being kept at the jail. From this it appears that neither Sergeant Bunting, Detective Marmion, nor any of the other officers working on the case had anything to do with where petitioner was being kept. Additionally, petitioner was not in "solitary" as such, he was with a "brother" named Al J. Carter. Finally, petitioner never claimed that this night he spent in solitary had any coercive effect on him when he made his statement, and there is no evidence in the record that it had such an effect.

Petitioner claimed that he told the detention officer that he did not want to come out of his cell. He also claimed that he told the detectives that he did not want to speak to them. Both detectives testified that petitioner never told them that he did not want to talk to them. The trial judge did not believe petitioner, and specifically found that Detective Marmion did nothing wrong, and found that there was no compulsion or anything of that kind used on petitioner.[58] Assuming that it is true that petitioner told the detention officer that he did not want to talk to the detectives, the facts as found by the trial judge were that he never told this to the detectives, and that they did not know of this statement by petitioner, if in fact he did actually make it. The record clearly supports the finding of the trial court that petitioner's incriminating statement was freely and voluntarily made, and that there was no compulsion or coercion used by the detectives.

Petitioner claims that he did not ask for an attorney the morning of January 20, 1976, because "I didn't think you had to keep asking for an attorney over and over and

[57] J.A. at 91.

[58] J.A. at 92.

over."[59] All of the officers who testified said that petitioner never, at any time, asked for an attorney, or said that he would not talk until he saw one. Since petitioner did not ask for an attorney in the first place, it seems strange that he would view the matter in terms of asking over and over and over. This appears to be another one of petitioner's inconsistent statements that the trial court did not believe.

Petitioner makes much of the fact that he told the detectives that he did not want the statement recorded because he did not want it used in court. A similar situation occurred in *United States v. Charlton*,[60] where the suspect agreed to talk provided it was "off the record." The court rejected the contention that this made the statement inadmissible:

> There is no evidence that any of the officers ever promised such confidentiality to his statements. The rights which *Michigan v. Mosley* commands be "scrupulously honored" do not in our judgment include a right to control the use of a statement which is otherwise voluntarily given with full knowledge of its potential incriminatory value.

565 F.2d at 90 n.2. This same reasoning was used to reject a similar admissibility argument in *Kennedy v. Fairman*:[61]

> Petitioner contends that he did not waive any rights by telling the officers that he was willing to talk; rather, he made statements to the police under the erroneous assumption that because he had no attorney present, nothing he said could be used against him. We do not find this argument persuasive.

618 F.2d at 1248. In this case, petitioner on four occasions was advised that anything he said could be used against him. The psychiatrist who examined him said that his intelligence was such that he would be able to understand the

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[59] J.A. at 84.

[60] 565 F.2d 86 (6th Cir. 1977), *cert. denied sub nom. Jacek v. United States*, 434 U.S. 1070 (1978).

[61] 618 F.2d 1242 (7th Cir. 1980).

Miranda rule and know that anything he said could be used against him.[62] Detective Marmion testified that he knew a statement would not be admissible if petitioner did not understand, so he "wanted to be sure [petitioner] understood what was going on, that he voluntarily waived his right, that he understood it would be used against him."[63] In petitioner's own words, he had been around and knew what was going on.[64] Petitioner knew that, once he had made a statement on tape, he could no longer deny that he made it. On the other hand, if he later wanted to deny that he made the statement and it was not on tape, he could deny it, and it would be his word against the detectives' word. That clearly was his ultimate strategy. He told his original attorney, David Hoffman, that he never made the second statement, and told Hoffman to make the police officers produce some tape recording or written record of the statement.[65] At the first day of the voluntariness hearing, petitioner denied that he made the second statement.[66] And finally, during closing argument, petitioner told the jurors that, because the detectives did not have any written or recorded proof that he made a statement, that meant that he did not make a statement.[67] The record clearly shows that petitioner knew how the system worked, and tried to manipulate it to his advantage. This is not a case of an unknowing person overwhelmed by the system. Petitioner knew what his rights were, knew what he was doing, and made an intelligent, knowing, and voluntary waiver of his right to an attorney and his right to remain silent. The trial court so found, and we ask this Court to uphold the ruling of the trial court.

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[62] S.A. at 59.

[63] J.A. at 59.

[64] J.A. at 39.

[65] S.A. at 57.

[66] J.A. at 50.

[67] S.A. at 65-66.

CONCLUSION

For all of the above-stated reasons, respondent respectfully requests that this Court affirm the judgment of the Arizona Supreme Court.

Respectfully submitted,

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